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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 325 VANSTON BONDHOLDERS PROTECTIVE COMMITTEE, *Petitioner,* *vs.* THE COLUMBIA GAS SYSTEM, INC., *Respondent.*	On Petitions for Writ of Certiorari
No. 336 Committee for Holders of KENTUCKY FUEL GAS CORPORATION 6½% Debentures, *Petitioner.* *vs.* THE COLUMBIA GAS SYSTEM, INC., *Respondent.*	
No. 342 PAUL E. KERN, a Holder of KENTUCKY FUEL GAS CORPORATION First Mortgage Bonds and 6½% Debentures, *Petitioner,* *vs.* THE COLUMBIA GAS SYSTEM, INC., *Respondent.*	

Consolidated Brief of The Columbia Gas System, Inc. in Opposition to the Above-Captioned Petitions for Writs of Certiorari to the United States Court of Appeals for the Sixth Circuit

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DEFINITIONS AND REFERENCES

American Fuel, Inland and Kentucky Fuel: Respectively, American Fuel and Power Company, Inland Gas Corporation and Kentucky Fuel Gas Corporation, the debtors in the three proceedings under Chapter X* of the Bankruptcy Act in the District Court.

Post-Bankruptcy Interest: Interest after the institution of a receivership, bankruptcy or reorganization proceedings; this term is generally used in bankruptcy cases whether in proceedings for liquidation, reorganization or arrangement.

Emphasis has been supplied and parallel citations have been omitted in quotations throughout this Brief.

Citations to the opinion below are to the reproduction thereof contained in the Appendix of the Petition of Vanston Bondholders Protective Committee (No. 325).

Note As to the Record.

Certain portions of the original record before the District Court were printed for the use of the Court of Appeals in Cases No. 9775-77 (prior appeals in these proceedings reported at 151 F. 2d. 461 (1945)). In the appeals below these portions of the record were transmitted and certified by the District Court in the form of these printed volumes in lieu of original record and have also been transmitted and certified to this Court in this form. References thereto are designated: 1945 Rec.

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*The various Chapters and Sections of the Bankruptcy Act are fully cited in the Table of Authorities and are referred to herein only by original Chapter and Section numbers.

COUNTERSTATEMENT OF QUESTIONS PRESENTED

Although Petitioners all represent Bonds or Debentures of Kentucky Fuel, their statements of "Questions Presented" vary and overlap. We submit the following as the questions presented:

(1) Is it the general rule of law that interest on unsecured claims against an insolvent Debtor (including a Debtor in proceedings under Chapter X of the Bankruptcy Act) ceases to accrue at the institution of bankruptcy proceedings?

(2) Was it error or an abuse of discretion for the Court of Appeals to adhere to that general rule (affirming the District Court in that regard) in the circumstances of this case?

COUNTERSTATEMENT OF THE CASE

(a) Introductory

The three Petitions seek writs of certiorari to a decision which applied, in a Chapter X reorganization, to a complicated security structure involving complex intercorporate relationships set against the background of many years of litigation, the well-established rule that unsecured claims do not bear post-bankruptcy interest.

Respondent holds direct secured claims against the debtor Inland, which have (by a prior decision in the same proceeding) been subordinated for equitable reasons to the claims of other creditors. On several prior occasions, disallowance of Respondent's claims has been sought in but denied by the Court of Appeals. Petitioners hold or represent unsecured claims of a *separate but affiliated* debtor corporation, Kentucky Fuel, and (by another prior decision in the same proceeding) have been held for equitable reasons to be "quasi-creditors"* of Inland.

*See pp. 6-8, *infra*.

In this somewhat complicated situation, the District Court held that Petitioners should not be awarded post-bankruptcy interest on their claims. The Court of Appeals affirmed (one Judge dissenting). Both courts have had very long experience with the tangled affairs of the debtor corporations.

Both courts recognized that this holding will result in some recovery on account of Respondent's subordinated claims. The Court of Appeals' opinions show that it was aware of the full extent of its equitable powers but all three judges again agreed that Respondent's claims should not be disallowed. Two judges refused further to subordinate Respondent's claims by awarding post-bankruptcy interest on the "quasi-creditor" claims of Petitioners prior to payment of principal on Respondent's subordinated claims against Inland. The dissenting judge disagreed and thought that post-bankruptcy interest should be awarded on the unsecured "quasi-creditor" claims.

A long history precedes the decision below.

We shall not summarize the early history (1927-1929) of the debtor corporations or of Respondent's purchases for value of their securities during 1930 which resulted in its acquiring control. We do not conceive it necessary for this Court to reappraise the equities involved in that history which led the Court below in 1945 to order a subordination of Respondent's claims.

All three Petitions give highly colored summaries of the events on which the subordination is based. All three base their "Statements" on an opinion of the Court of Appeals which that Court now regards as superseded. That opinion, *In re American Fuel & Power Co.*, 122 F. 2d 223 (1941), was rendered in proceedings to which Respondent was not a party and, to a large extent, on the basis of allegations in pleadings (see 1945 Rec. V. 1., pp. 211-26). In a subsequent decision, to which Respondent was a party and

which was rendered on a complete record, the Court of Appeals said, with respect to its 1941 opinion:

> "... We are not obliged to consider whether, *upon the facts there assumed*, the American Fuel and Power case was rightly decided, or its mandate broader than the issues required. Columbia was not bound by it, the present record is complete, and the principle of 'the law of the case' does not govern our decision. ..." (151 F. 2d 461, 463 (1945))

That the Court of Appeals does not regard its 1941 opinion as presently pertinent to this case is further shown by the fact that in the second paragraph of the opinion below Judge Simons cites all of the Court's prior decisions *beginning* with that in 151 F. 2d 461 (1945) and omits reference to the 1941 opinion.

In so far as this Court finds it necessary, on these Petitions, to appraise the events upon which the Court of Appeals based its various decisions subordinating Respondent's claims, the District Court's findings of fact as to those events are set forth in the record (1945 Rec. V. 1, pp. 590-603). Those findings (although vigorously disputed by Respondent) were affirmed by the Court of Appeals in its 1945 decision.

(4) The Court of Appeals' Initial Decision Subordinating Respondent's Claims (1945)

On the basis of those findings the Court of Appeals (151 F. 2d 461) ordered, in each of the three pending Chapter X proceedings, that the claims of Respondent against the debtors be subordinated to the claims of other creditors. The total amounts of the claims (and the amounts held by Respondent) prior to that decision, and whose priority was thereby affected, were as follows*:

*We omit claims against American Fuel as not here pertinent, because creditors of American Fuel were not appellants below on the post-bankruptcy interest issue and are not parties to these Petitions.

Inland: $4,254,700 principal amount of First Mortgage Bonds (Respondent: $1,596,600); $1,450,000 principal amount of Debentures, secured by a second mortgage (Respondent: $320,100); $400,000 principal amount of Notes, all held by American Fuel and secured by the same second mortgage; and general claims in principal amount of $598,417 (Respondent: $252,313). —an aggregate of $6,703,117.

Kentucky Fuel: $3,939,500 principal amount of First Mortgage Bonds (Respondent: $1,702,900); $939,600 principal amount of unsecured debentures (Respondent: $397,600) and general claims in principal amount of $152,859 (Respondent: $65,607)—an aggregate of $5,031,959.*

(c) Events Subsequent to the 1945 Decision Ordering Subordination

During the 12 years elapsed since the Court of Appeals' 1945 decision, these debtors and their estates have presented a twofold history: sound and successful business operation (the business being Inland's, the owner of the operating properties); frustration and litigation in all efforts to reorganize (much of the litigation caused by the holders of securities of Kentucky Fuel and American Fuel**).

Under the custody of the District Court, and the business guidance of an able Trustee, the Inland gas enterprise has made sound and steady operating progress. The present Inland Trustee has taken full advantage of the post-World War II growth in the natural gas industry and his

*See Plan of Reorganization, dated Feb. 12, 1953, as Further Amended Sept. 23, 1955, and as Finally Amended, pp. 3-5, Exhibits A and B.

**Far and away the major part of these securities (and depositary certificates representing them) had been purchased during the pendency of the proceedings, at tremendous discounts from principal amount, for speculative purposes. See pp. 28-30, *infra*.

sound management during this period made it possible to pay full principal and interest to the date of payment on all of Inland's First Mortgage Bonds and Debentures and Notes (secured by second mortgage) other than those owned by Respondent.

In the foregoing paragraph we refer to the Trustee of *Inland* because it is Inland's business and Inland's properties which lie at the base of any value for the securities of the three debtor companies.

American Fuel has always been a holding company; it owns 72.6% of the stock of Inland, 99% of the stock of Kentucky Fuel and 100% of the stock of certain other companies not important to the issues here involved.

Kentucky Fuel originally was in part a holding company and in part an operating company. It owns 26% of the stock of Inland* and at one time owned certain gas production properties. It was on the basis of the pledge of these properties that its First Mortgage Bonds were issued. Under Court Order in 1939, they were sold at public auction to the Inland Trustee for $151,000; subsequently, the proceeds of this sale and the bulk of treasury cash were distributed to the bondholders other than Respondent and thus the bondholders became the holders of deficiency claims on a par with the unsecured Debentures. Thereafter, Kentucky Fuel was purely a holding company.**

However, reorganization proceedings in the District Court met with continual frustration. During the years following the 1945 subordination of Respondent's claims, successive appeals from District Court orders relating to successive plans were taken by various parties, resulting in decisions by the Court of Appeals reported in *In re Inland Gas Corp.*, 187 F. 2d 813 (1951) (5 appeals); *In re Inland Gas Corp.*, 208 F. 2d 13 (1953); *In re Inland Gas Corp.*, 211

*The remaining 1.4% of the stock of Inland is publicly held.

**See 208 F. 2d 13, 14 (1953).

F. 2d 381, *cert. denied*, 348 U. S. 840 (1954) (4 appeals); *In re Inland Gas Corp.*, 217 F. 2d 207 (1954); and *In re Inland Gas Corp.*, 241 F. 2d 374 (1957) (7 appeals), the decision to which writs of certiorari are now sought.

Through all these decisions the Court of Appeals has shown great awareness of its equity powers. As values of the Inland business and properties increased, the Court has been resourceful in developing new legal concepts to arrive at results which it believed equitable.

(d) The Court of Appeals' Modification Which Made Kentucky Fuel Creditors "Quasi-Creditors" of Inland (1951)

A plan of reorganization was prepared in accordance with the 1945 subordination decision and in 1950 was approved by the District Court. By that time, cash generated from successful operations had been applied to pay the full principal of the Inland First Mortgage Bonds (owned by others than Respondent) plus interest to date of payment, and the plan made provision equivalent to payment of the full principal of the secured Inland Debentures (owned by others than Respondent) and Inland Notes plus interest to the date of payment. As a surplus of Inland assets existed, the plan provided a minor participation for Respondent's subordinated claims against Inland.

The creditors of Kentucky Fuel and American Fuel appealed to the Court of Appeals for equitable intercession, whereupon that Court reversed the District Court and denominated the creditors of Kentucky Fuel and American Fuel as "quasi-creditors" of Inland and modified its previous mandate to direct the District Court to

> "'. . . assign the residue of Inland assets over its debts, exclusive of Columbia's claims, to the account of their public creditors [the public creditors of American Fuel and Kentucky Fuel] according to the respective stock interests of 72.6% for American

> and 26% for Kentucky . . . [W]e are unable to make any provision for the minor interest of 1.4% of the common stock of Inland directly held by public investors. . . The holders of such stock were in no sense creditors." ('87 F. 2d 813, 817)*

Thus, for the second time, the Court of Appeals, as a court of equity, altered the priorities of the creditors. The creditors of Kentucky Fuel were elevated to the status of "quasi-creditors" of Inland to the extent of 26% of the assets of Inland available after the satisfaction of Inland's creditors other than Respondent but before the satisfaction of Respondent's secured claims against Inland.

(e) The Court of Appeals' Modification Giving Further Equitable Benefits to Kentucky Fuel Creditors (1954)

Further successful operation of Inland increased the cash available for distribution. The remaining assets of Inland which were assigned to American Fuel creditors (72.6%) on the "quasi-creditor" theory were more than adequate to provide for payment of the claims against it.

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*The Court of Appeals explained its decision:

> " . . . we think that the public security holders whose investments were guaranteed and supported by a pledge of Inland stock are, in a very true sense, creditors or quasi-creditors of Inland . . ." (*id.* at 817).

It was subsequently determined by the District Court (Order entered Dec. 15, 1955) that there was no pledge of the Inland stock to secure the Kentucky Fuel Bonds. The Debentures were completely unsecured and shared "quasi-creditor" status with the Bonds only by virtue of a compromise between them which stipulated that the Bonds would receive 92% and the Debentures 8% of whatever assets of Inland were distributed to Petitioners. This was a compromise of the dispute between the Bonds and Debentures as to whether or not the Inland stock owned by Kentucky Fuel had been pledged under the mortgage under which the Bonds were issued (see Second Advisory Report of the Securities and Exchange Commission, Sept. 18, 1952, p. 33 (SEC Corp. Reorg. Rel. No. 90)); this compromise was repudiated by the Debenture Committee and, as indicated, the dispute adjudicated adversely to the Bondholders.

Thereupon, in 1954, the Court of Appeals again exercised its equitable powers on behalf of Petitioners and (in further subordination of Respondent's claims) directed that after application of such of the Inland assets as were necessary to pay the claims of American Fuel creditors (other than those of Respondent)

> ". . . The balance remaining is to be assigned to the payment of Kentucky's secured [*] obligations. This will give Kentucky something more than 26% of Inland's surplus but will still fall far short of liquidating Kentucky's securities." 211 F. 2d 381, 383

In diagrammatic form the structure of debt securities of the three debtor corporations thus resulting from the alterations of priorities by the various Court of Appeals' decisions may be shown as follows:

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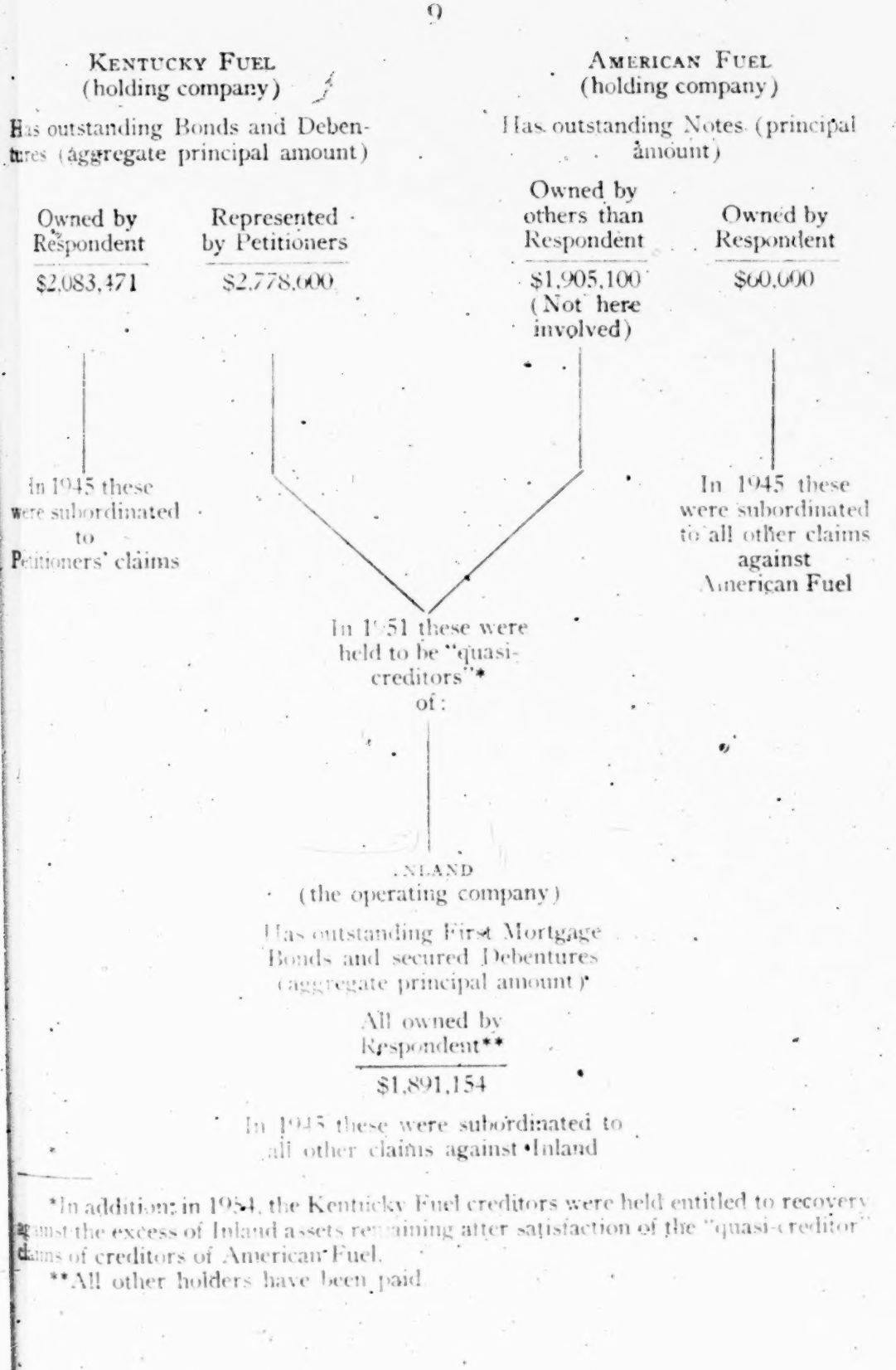
*See footnote *, p. 7, *supra*.


KENTUCKY FUEL
(holding company)
Has outstanding Bonds and Debentures (aggregate principal amount)
Owned by Respondent
$2,083,471
Represented by Petitioners
$2,778,000
In 1945 these were subordinated to Petitioners' claims
AMERICAN FUEL
(holding company)
Has outstanding Notes (principal amount)
Owned by others than Respondent
$1,905,100
(Not here involved)
Owned by Respondent
$60,000
In 1945 these were subordinated to all other claims against American Fuel
In 1951 these were held to be "quasi-creditors"* of:
INLAND
(the operating company)
Has outstanding First Mortgage Bonds and secured Debentures (aggregate principal amount)
All owned by Respondent**
$1,891,154
In 1945 these were subordinated to all other claims against Inland

*In addition, in 1954, the Kentucky Fuel creditors were held entitled to recovery against the excess of Inland assets remaining after satisfaction of the "quasi-creditor" claims of creditors of American Fuel.

**All other holders have been paid.

Following the Court of Appeals' modification of its mandate in 1954 to give further equitable benefits to Petitioners, continued successful operations placed them in a position to receive, as "quasi-creditors" of Inland, payment of the full principal amount of their Kentucky Fuel Bonds and Debentures. After provision for such payment a surplus remained in the Inland estate.

(f) The Decision Below

The Trustee, in 1955, submitted a plan to the District Court which provided for the sale of all assets and application of the proceeds (i) to the payment of all principal on the Kentucky Fuel Bonds and Debentures, other than those of Respondent and (ii) to the payment of post-bankruptcy interest on those claims. This plan was submitted to the creditors for approval. Petitioner Kern actively opposed this plan and his adverse vote (since he had acquired 34% of the principal amount of outstanding Kentucky Fuel Bonds, see Section 216(7) of the Bankruptcy Act) was sufficient to defeat its acceptance by the affected creditors. The Trustee moved the District Court to confirm the plan despite this adverse vote (see Section 203 of the Bankruptcy Act). The District Court refused: one of the reasons for such refusal was that the plan provided for the award of post-bankruptcy interest on the claims of Petitioners (which were unsecured) prior to payment of the principal amount of the claims of Respondent, which the Court held was contrary to the decision of this Court in *New York* v. *Saper*, 336 U. S. 328 (1949).

In their appeal from that decision, the Kentucky Fuel Bonds and Debentures were, for the fourth time, requesting the equitable intercession of the Court of Appeals. Their request was, in effect, that the Court further alter its prior mandates so as to give to them—unsecured creditors of Kentucky Fuel whom the Court had previously made un-

secured "quasi-creditors" of Inland—post-bankruptcy interest prior to any payment on Respondent's secured claims against the Inland estate.

The Court of Appeals refused further to modify or reopen its prior mandates. It refused to order the District Court to depart, for the benefit of these Petitioners, from the well established rule that post-bankruptcy interest does not accrue on unsecured claims.

ARGUMENT

I. THE DECISION BELOW DOES NOT PRESENT ANY IMPORTANT QUESTION OF FEDERAL LAW THAT HAS NOT ALREADY BEEN DECIDED BY THIS COURT.

A. The Question as to Post-Bankruptcy Interest.

None of the Petitions states, in its "Questions Presented", that it is questioning the general rule against post-bankruptcy interest or the well recognized and well defined exceptions to the rule. However, all the Petitions (in varying degrees) attack the general rule, as well as the District Court and the Court of Appeals for applying the rule in the instant case.

The existence of the general rule, and its well defined exceptions, must be the point of departure in determining whether the two Courts below were in error or abused their discretion in applying it here.

1. For more than 200 years it has been recognized as a "fundamental principle" that, subject to certain well defined exceptions, post-bankruptcy interest is not payable on claims in bankruptcy and receivership proceedings.

In 2 Blackstone, Commentaries *488, the rule is clearly stated:

> ". . . the usual rule is, that all interest on debts carrying interest shall cease from the time of issu-

> ing the [receiver's] commission, yet, in case of a surplus left after payment of *every debt*, such interest shall again revive, and be chargeable on the bankrupt, or his representatives."

This Court, per Justice Holmes in *Sexton* v. *Dreyfus*, 219 U. S. 339, 344 (1911), recognized and incorporated the early English rule into American bankruptcy jurisprudence:

> "For more than a century and a half the theory of the English bankruptcy system has been that everything stops at a certain date. Interest was not computed beyond the date of the commission. . . . [T]he rule was laid down not because of the words of the statute but *as a fundamental principle*. We take our bankruptcy system from England, and we naturally assume that the fundamental principles upon which it was administered were adopted by us when we copied the system, somewhat as the established construction of a law goes with the words where they are copied by another State. *No one doubts that interest on unsecured debts stops.*"

In 1949, this Court in *New York* v. *Saper*, 336 U. S. 328 (1949), a straight bankruptcy proceeding, reaffirmed the "fundamental principle" that interest on all claims *stops* at the date of bankruptcy and squarely held that an allowance for post-bankruptcy interest is not to be awarded on unsecured claims, even though such claims were entitled to a statutory priority, until principal was paid on all lower ranking claims. In the opinion of Justice Jackson, writing for the Court, the problem was stated thus:

> "The ultimate issue in these three cases is whether tax claims against a bankrupt bear interest until the date of bankruptcy, as held by the court below, or until payment, as previously held by another Court of Appeals." (336 U. S. at 329)

He then reviewed the history of the rule, stating:

> ". . . More than forty years ago Mr. Justice Holmes [in *Scarton v. Dreyfus*] wrote for this Court that the rule stopping interest at bankruptcy had then been followed for more than a century and a half. . . . Our present statute contains no provision expressly repudiating that principle or allowing an exception in favor of tax claims. Every logical implication from relevant provisions is to the contrary. . . . *No provision permits post-bankruptcy interest on other claims in general* or tax claims in particular. . . . Moreover, there is no interest except that which accrues according to law—it is exactly such interest that the *'fundamental principle'* cuts off as of bankruptcy. . . . Tax claims are treated the same as other debts except for the fourth priority of payment, § 64(a), 11 U. S. C. § 104(a). . . ." (336 U. S. at 330-32)

The opinion is thus explicit that, because claims for taxes are treated the same as all other unsecured claims, they cannot, regardless of their statutory priority over other claims, be awarded an allowance for post-bankruptcy interest.

There are certain instances in which the rule against post-bankruptcy interest does not operate. This Court, in the *Saper* case, referred to two of these exceptions and has previously recognized the third:

(1) "[I]f the alleged 'bankrupt' proved solvent, creditors received post-bankruptcy interest before any surplus reverted to the debtor . . ." (336 U. S. at 330) (*accord, e.g., American Iron & Steel Co.* v. *Seaboard Airline Ry.*, 233 U. S. 261 (1914); *Johnson* v. *Norris*, 190 Fed. 459 (5th Cir. 1911)).

(2) "[I]f securities held by a creditor as collateral produced interest or dividends during bankruptcy such amounts were applied to post-bankruptcy inter-

est . . ." (336 U. S. at 330) (*accord, e.g., Sexton* v. *Dreyfus*, 219 U. S. 339 (1911); *Beecher* v. *Leavenworth State Bank*, 192 F. 2d 10 (9th Cir. 1951), *cert. denied*, 343 U. S. 953, 344 U. S. 886 (1952)).

(3) If the value of the pledged property is more than sufficient to pay principal, the excess value will be applied toward post-bankruptcy interest on a secured claim. *Vicmic Nat'l Bank* v. *Sprague*, 303 U. S. 406, (1938); *Coder* v. *Arts*, 213 U. S. 223, 245 (1909); (*accord, In re Macomb Trailer Coach, Inc.*, 200 F. 2d 611, 613 (6th Cir.), *cert. denied*, 345 U. S. 958 (1953)).

It is obvious that Petitioners' claims, which are unsecured claims against the insolvent Kentucky Fuel, do not fall within any exception to the "fundamental principle".*

Petitioners attack the general rule of law with respect to post-bankruptcy interest primarily on two grounds, *viz.*:

1. that the rule is applicable only to "straight" bankruptcy proceedings and not to corporate reorganizations under Chapter X; and

2. that *Saper*, being a tax case, announces a rule applicable only to other tax cases.

1. In asserting that this rule is a "bankruptcy rule", inapplicable in reorganization proceedings under Chapter

*Petitioner Kern attempts to indicate that a formidable dollar amount of securities is interested in the issue in these causes by printing a tabulation (footnote 20, p. 17 of his Petition) showing the annual volumes of new offerings of debt securities and the percentages of these which are unsecured notes and debentures. These figures are obviously irrelevant. The relative rights in reorganization proceedings between secured and unsecured debt are not in question here and both the total dollar figures and the percentages given are without pertinence.

X. Petitioners ignore the *per curiam* decisions rendered by this Court in 1952 shortly after *Saper* which apply the rule against post-bankruptcy interest with equal vigor to proceedings under Chapter X (*United States* v. *Edens*, 342 U. S. 912), Chapter XI (*United States* v. *General Engineering & Mfg. Co.*, 342 U. S. 912*), and in a general assignment for the benefit of creditors (*United States* v. *Bloom*, 342 U. S. 912).

2. In asserting that this rule is peculiarly applicable to claims for taxes, petitioners ignore (i) the rationale of *Saper* (assimilation of tax claims to other claims so far as concerns post-bankruptcy interest); (ii) the non-tax cases which have followed *Saper* (*e.g.*, *In re Macomb Trailer Coach, Inc.*, 200 F. 2d 611 (6th Cir.), *cert. denied*, 345 U. S. 958 (1953) (note recognition (200 F. 2d at 613) that *Saper* involved "tax claims *which are not secured obligations*"), *Beecher* v. *Leavenworth State Bank*, 192 F. 2d 10 (9th Cir. 1951), *cert. denied*, 343 U. S. 953, 344 U. S. 886 (1952)); and (iii) the innumerable non-tax cases decided prior to but in accord with *Saper*.**

Furthermore, that the *Saper* case (and subsequent decisions of this Court) dealt with claims for taxes—interest on which is typically by statute made a "part of the tax"***

*See also *National Foundry Co.* v. *Director of Internal Revenue*, 229 F. 2d 149 (2d Cir. 1956); *Second Line, Inc.* v. *Industrial Comm'r*, 212 F. 2d 865 (2d Cir.), *cert. denied*, 348 U. S. 830 (1954); *Massachusetts* v. *Thompson*, 190 F. 2d 10 (1st Cir. 1951), *cert. denied*, 342 U. S. 918 (1952).

**E.g., *Thomas* v. *Western Car Co.*, 149 U. S. 95 (1893); *Oppenheimer* v. *Oldham*, 178 F. 2d 386 (5th Cir. 1949); *Littleton* v. *Kincaid*, 179 F. 2d 848 (4th Cir. 1950); *Pacific States Corp.* v. *Hall*, 166 F. 2d 668 (9th Cir. 1948); *In re Gotham Can Co.*, 48 F. 2d 540 (2d Cir. 1931); *Samuels* v. *E. F. Drew & Co.*, 292 Fed. 734 (2d Cir. 1923); *New York Trust Co.* v. *Detroit, T. & I. Ry.*, 251 Fed. 514 (6th Cir. 1918); *Tredegar Co.* v. *Seaboard Air Line Ry.*, 183 Fed. 289 (4th Cir. 1910).

***See, *e.g.*, New York City Sales Tax, N. Y. C. Charter Administrative Code § N 41-17.0 (Supp. 1952) which was involved in the *Saper* case.

and which enjoy by statute priority over all claims except administrative and wage claims (§ 64a of the Bankruptcy Act)—seems, if anything, to enhance its force in the instant case.

2. The "fundamental principle" is not altered by the fact that there are differences in rank between unsecured claims *inter sese*.

Two or more classes of *unsecured* creditors, some having a preference or priority over others, is a common phenomenon. While *Saper* itself is a prime example, long before *Saper* the rule had many times been applied

> "... that claims entitled to priority do not bear interest for the period covered by the bankruptcy proceeding, unless the assets prove sufficient to pay the principal of all claims." Am. Jur. *Bankruptcy* § 537.*

This rule has been applied in State and Federal courts, whether the priority was contractual, equitable or statutory:

CONTRACTUAL PRIORITY: *Jamison* v. *Federal Deposit Insurance Corporation*, 149 F. 2d 199 (5th Cir. 1945). Debentures which expressly provided that they were subordinated to the payment "in full" of all other creditors, *held* entitled to payment after all unsecured creditors received principal of claims, *but not interest*. *Accord*, *United States* v. *Paddock*, 187 F. 2d 271 (5th Cir. 1951) (basis of priority was alternatively contract or constructive trust); *FDIC* v. *Dep't of Financial Inst.*, 113 Ind. App. 14, 44 N. E. 2d 992 (1942); *Atlanta Nat'l Bank* v. *Four States Grocer Co.*, 135 S. W. 1135 (Tex. Civ. App. 1911); *Att'y General* v. *Supreme Council A. L. H.*, 206 Mass. 131, 92 N. E. 134 (1910).

*To the same effect Glenn, Liquidation §§ 488, 510 (1943); Hanson, *Effect of Insolvency Proceedings on Creditor's Right to Interest*, 32 Mich. L. Rev. 1069, 1071-72 (1934); Note, 69 A. L. R. 1210 (1930).

EQUITABLE PRIORITY:

(i) Claims accorded priority because of superior equities—*Thomas* v. *Western Car Co.*, 149 U. S. 95 (1893). The priority given to six months' claims in equity receiverships is an equitable one; this Court denied post-bankruptcy interest on such claims since other claims could not be paid principal in full. *Accord*, *New York Trust Co.* v. *Detroit, T. & I. Ry.*, 251 Fed. 514 (6th Cir. 1918) (six months' claims); *Squire* v. *American Express Co.*, 131 Ohio State 239, 2 N. E. 2d 766 (1936) (constructive trust); *Farish* v. *Holley*, 244 Ala. 19, 12 So. 2d 88 (1943) (constructive trust).

(ii) Claims subordinated because of inequitable conduct of claimants—*Application of Progress Shoe Co.*, 107 F. Supp. 114 (E. D. N. Y. 1952). Stockholders of corporation in Chapter XI proceeding filed claims concededly required to be subordinated for equitable reasons—the court quoted and affirmed the Referee's opinion:

> ". . . [these claims] should be subordinated to the payment of 100% of the claims of general unsecured creditors *without interest* . . ." (107 F. Supp. at 116).

McGinnis v. *Corporation Funding & Finance Co.*, 8 F. 2d 532 (M. D. Pa. 1925). Creditors, who were directors of the insolvent corporation and whose claims had been subordinated for inequitable conduct, were entitled to payments of principal prior to the award of post-bankruptcy interest to the other creditors for whose benefit the subordination had been ordered.

STATUTORY PRIORITY: The cases are numerous. In addition to *Saper* and decisions following it, *e.g.*, *Missouri* v. *Earhart*, 111 F. 2d 992 (8th Cir. 1940); *In re Pacific Coast Building-Loan Ass'n*, 15 Cal. 2d 134, 99

P. 2d 251 (1940); *Fulton v. B. R. Baker-Toledo Co.*, 128 Ohio State 226, 190 N. E. 459 (1934); *Taylor v. Corning B. and T. Co.*, 185 Ark. 691, 48 S. W. 2d 1102 (1932); *Leach v. Sanborn State Bank*, 210 Iowa 613, 231 N. W. 497 (1930); *Cosmopolitan Trust Co. v. Suffolk Knitting Mills*, 247 Mass. 530, 143 N. E. 138 (1924); *United States F. and G. Co. v. Carnegie Trust Co.*, 161 App. Div. 429, 146 N. Y. Supp. 804 (1st Dep't), *aff'd*, 213 N. Y. 629, 107 N. E. 1087 (1914); *People v. American Loan and Trust Co.*, 172 N. Y. 371, 65 N. E. 200 (1902).

3. The decisions cited in the Petitions lend no support to Petitioners' contradiction of the above-stated rule of law and its application.

One of the principal cases relied on by the Petitions in their challenge of the rule of law applied below is *Vanston Bondholders Protective Committee v. Green*, 329 U. S. 156 (1946), where this Court held that:

(i) "In determining ... how a debtor's assets shall be distributed, a bankruptcy court does not apply the law of the state where it sits"; and "[w]hen and under what circumstances federal courts will allow interest on claims against debtors' estates being administered by them has long been decided by federal law" (329 U. S. at 162-63); and

(ii) "The general rule in bankruptcy and in equity receivership has been that interest on the debtors' obligations ceases to accrue at the beginning of proceedings" and "interest on interest on secured claims must be disallowed (*id.* at 163).

In the course of these holdings, the Court stated that "[i]t is manifest that the touchstone of each decision on allowance

of interest in bankruptcy, receivership and reorganization has been a balance of equities . . ." *Id.* at 165).

That *Vanston* does not overrule all the prior decisions of this Court and lower courts with respect to post-bankruptcy interest (and in view of subsequent decisions such as *Saper* it would be untenable to suggest that *Vanston* accomplished such a result) has been recognized by the Court of Appeals for the Fifth Circuit in *Georgia, Florida & Alabama R. R. v. Bankers Trust Co.*, 170 F. 2d 733, 734 (5th Cir. 1948) which stated:

> "The *Vanston* case . . . does not in our opinion propound any new law in respect of interest accruing during receiverships and bankruptcies"

The Court of Appeals below, fully cognizant of the primary import of the *Vanston* case, commented:

> ". . . The actual ruling in the case was *a disallowance of interest* on interest on secured claims. . . ." (Vanston App. 22a)

This Court itself so applied *Vanston* (one week after that decision) in *Fleming v. Esplugen*, 329 U. S. 686 (1946), reversing, *per curiam*, the decision of the Seventh Circuit in *In re Chicago, R. I. & P. Ry.*, 155 F. 2d 889 (1946).

The remainder of the cases which the Petitions attempt to utilize in direct and indirect attacks on the general rule are briefly summarized (and it is obvious that they actually either support the rule or have no relevance to it):

American Iron & Steel Co. v. Seaboard Airline Ry., 233 U. S. 261 (1914), *held*, that interest is payable on secured claims where the debtor had returned to solvency; *See, cf.* (336 U. S. at 330) and the opinion of the Court of Appeals below recognized that these factors were the basis for that decision.

Consolidated Rock Products v. DuBois, 312 U. S. 510 (1941), *held*, that interest is payable on the de-

ficiency claim of a secured creditor prior to any distribution to common stockholders—an application of the "solvency" exception recognized in *Saper* (330 U. S. at 330).

Spring Coal Co. v. *Keech*, 239 Fed. 48 (4th Cir. 1916) and *Board of Comm'rs* v. *Bernardin*, 74 F. 2d 809 (10th Cir.), *cert. denied*, 295 U. S. 731 (1935), *held*, that post-bankruptcy interest was payable on tax claims because of their statutory priority; these cases were clearly overruled by *Saper*.

In re Deep Rock Oil Corp., 113 F. 2d 266 (10th Cir.), *cert. denied*, 311 U. S. 699 (1940), *held*, relying, *inter alia*, on *Spring Coal* and *Bernardin*, *supra*, that priority of principal determines priority of interest on unsecured claims.

Chicago R. I. & P. Ry. v. *Fleming*, 157 F. 2d 241 (7th Cir.), *cert. denied*, 329 U. S. 780 (1946), had no occasion to discuss (and did not discuss) the subject of post-bankruptcy interest since unsecured and deficiently secured creditors were not even receiving full payment of principal (the position of the Interstate Commerce Commission on this subject is set forth, *infra*, p. 22).

B. The Question as to Absolute Priority.

The Petitions assert that the application of the *Saper* rule to Petitioners' claims presents an important question of federal law in that it violates the absolute priority doctrine.*

Petitioners briefed and argued the absolute priority doctrine at length before the Court of Appeals but even the dissenting opinion of Judge Simons refused to recog-

*This assertion, of course, completely ignores that, on three separate occasions, Petitioners have benefited from an alteration of orthodox priorities; see Counterstatement, *supra*, pp. 3-4, 6-8.

nize it as relevant to this case. The clear holdings of this Court in *Saper* and subsequent cases should lay to rest any suggestion that absolute priority requires the award of post-bankruptcy interest on senior unsecured claims prior to the payment of junior unsecured claims.*

Despite their preoccupation with the absolute priority doctrine, Petitioners fail to refer to the case which squarely held *contra* to their contentions on this subject, *Massachusetts* v. *Thompson*, 190 F.2d 10 (1st Cir. 1951), *cert. denied*, 348 U. S. 918 (1952), and (save for Petitioner Kern) fail to mention another case which treated the relationship between the rule against post-bankruptcy interest and the absolute priority doctrine, *New York* v. *Feinberg*, 204 F. 2d 502 (2d Cir. 1953).

The majority in *Massachusetts* v. *Thompson*, an arrangement proceeding under Chapter XI which at that time embodied the "fair and equitable" standard,** rejected the argument of the dissenting judge that strict priority required the allowance of post-bankruptcy interest before the estate was returned to the debtor.*** *New York* v. *Feinberg* (a reorganization under Chapter X) rejected the contention of a senior unsecured (tax) claimant that the absolute priority doctrine required that the new securities to be issued to him bear the same rate of interest as his original claim and held that this doctrine only requires

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*See cases cited at p. 15, *supra*, where in proceedings under Chapter X and under Chapter XI (which at that time also incorporated the "fair and equitable" standard and thus the absolute priority doctrine) this and other Courts have applied the rule against post-bankrupt interest.

**It was nine months after that decision that the requirement that an arrangement be "fair and equitable" (see § 366 of the Bankruptcy Act) was eliminated from Chapter XI by the Act of July 7, 1952, c. 579, § 35, 66 Stat. 433.

***This Court denied certiorari, 342 U. S. 918 (1952) only two weeks after its *per curiam* decisions applying the *Saper* rule to proceedings under Chapter X, Chapter XI and compositions among creditors (see cases cited, page 15, *supra*).

recognition of priorities as of "the bar date of initiation of the proceedings" (204 F. 2d at 502-03), and hence did not affect the rules with respect to post-bankruptcy interest.*

For the sake of completeness, we shall comment in a footnote on certain of the authorities relied on by Petitioners in their attempts to create an absolute priority issue.**

C. The Question as to the Equitable Powers of a Court of Bankruptcy.

Petitioners assert that the decision below raises an important question of federal law insofar as it imposes a limitation of power on a bankruptcy court to adjust and determine

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*In addition, the Interstate Commerce Commission, in its administration of absolute priority under § 77 of the Act, has always taken the position that post-bankruptcy interest does not enter into the calculation in determining what is fair and equitable treatment upon reorganization; see *Florida East Coast Ry. Reorg.*, 282 I.C.C. 81, 178 (1951); *Wisconsin Cent. Ry. Reorg.*, 282 I.C.C. 393, 404 (1952).

**(i) *Consolidated Rock Products Co. v. DuBois*, 312 U. S. 510 (1941) (deficiency claims of bondholders are entitled to post-bankruptcy interest prior to a distribution to stockholders);

(ii) *Group of Institutional Investors v. Chicago, Milwaukee, etc. R. R.*, 318 U. S. 523, 573 (1943) ("no allowance should be made in the plan for interest on these [deficiently secured] bonds subsequent to the date of the filing of the petition.");

(iii) *Central States Electric Corp. v. Austrian*, 183 F. 2d 879 (4th Cir. 1950), *cert. denied*, 340 U. S. 917 (1951) and *In re Portland Electric Power Co.*, 162 F. 2d 618 (9th Cir.), *cert. denied*, 332 U. S. 837 (1947) (accumulated dividend arrearages on senior preferred stock paid prior to the participation of junior preferred stock; inasmuch as all claims had been paid, debtor was in fact solvent and the court applied corporate law rather than reorganization law);

(iv) *Eddy v. Prudence Bonds Corp.*, 165 F. 2d 157 (2d Cir. 1947), (senior lienors paid post-bankruptcy interest prior to junior lienors if income from or value of collateral sufficient to pay such interest—decided on basis of *Coder v. Arts* and *Ticonic Nat'l Bank v. Sprague* (discussed *supra* at p. 14), *i.e.*, "A pledgee acquires an interest in the pledge, which is not affected by the bankruptcy. . . ." (165 F. 2d at 160))

the rights and priorities of parties based upon "flexible, equitable considerations."

To the contrary, the opinion of the Court (Judge Miller) on the post-bankruptcy interest issue clearly stated the Court's understanding as to its broad equitable powers:

> ". . . Under the ruling in Sampsell v. Imperial Paper & Color Corp., 313 U. S. 215 and Pepper v. Litton, 308 U. S. 295, the Court had authority to disallow the claim of Columbia. Having declined to so do, Columbia is entitled to stand upon its rights as a creditor, even though a subordinated one." (Vanston App. 20a).

This is a plain statement by the Court (i) that it had power to disallow Respondent's claims entirely (thus increasing the participation of others) if equity required it, (ii) that (in the exercise of its equitable powers) it had again determined not to do so and (iii) the result of such determinations was Respondent's subordination to principal, but not to post-bankruptcy interest, of unsecured claims.

We submit that this is a construction, by the majority of the Court, of its prior mandates and a determination by it that, although the Court had equitable power again further to subordinate Respondent, it declined to do so (*i.e.*, reaffirmed its prior mandates).

Furthermore, it is inconceivable that the court below did not fully appreciate the scope and flexibility of its equitable powers sitting in bankruptcy when in these proceedings it has already exercised these equitable powers so as to accomplish

> (i) subordination of Respondent's secured claims against Inland to all other claims against Inland (like treatment was accorded Respondent's claims against Kentucky Fuel and American Fuel); 151 F. 2d 461 (1945);

(ii) on the "quasi-creditor" theory, elevation of the unsecured claims of the creditors of Kentucky Fuel to priority claims against 20% of the assets of Inland in further subordination of Respondent's secured claims against Inland (187 F. 2d 813 (1951));

(iii) by a modification of the "quasi-creditor" theory, further elevation of the unsecured claims of creditors of Kentucky Fuel to a priority position against the remainder of the assets of Inland in still further subordination of Respondent's secured claims against Inland (211 F. 2d 381 (1954)).*

Indeed, it is Petitioners who assert an "*in*flexible and *in*equitable rule. Petitioners have three times benefited from the exercise of the Court of Appeals' extraordinary equitable powers and now apparently assert that the failure of the Court to exercise such powers in their favor a fourth time constitutes error as a *matter of law*.

II. THE DECISION BELOW IS NOT IN CONFLICT WITH THE DECISION OF THIS COURT IN *TAYLOR* v. *STANDARD GAS & ELECTRIC CO.* OR WITH THE DECISION OF THE TENTH CIRCUIT IN *IN RE DEEP ROCK OIL CORP.*

The Petitions assert that the decision below is in conflict with the decision of the Court of Appeals for the Tenth Circuit in In re *Deep Rock Oil Corp.*, 113 F. 2d 266, *cert. denied*, 311 U. S. 699 (1940) and that that decision was a construction of the mandate of this Court in *Taylor* v. *Standard Gas & Electric Co.*, 306 U. S. 307 (1939)—thus concluding that the decision below is in conflict with a decision of this Court.

*The panel which decided the case below was composed of the same three judges (Simons, Martin and Miller) which rendered the decisions in 208 F. 2d 13 (1953), 211 F. 2d 381 (1954), and 217 F. 2d 297 (1954); Judge Simons and Judge Martin, together with Judge Hicks, rendered the decisions in 151 F. 2d 461 (1945) and 187 F. 2d 813 (1951).

1. This Court's decision in *Taylor* in no way dealt with (or even mentioned) the matter of post-bankruptcy interest on the claims of the public creditors and only directed the Court of Appeals as follows:

> "... No plan ought to be approved which does not accord the preferred stockholders a right of participation in the equity in the Company's assets prior to that of Standard, and at least equal voice with Standard in the management." (308 U. S. at 324).

Reference to the opinion of the Tenth Circuit in *Deep Rock* dealing with the question of post-bankruptcy interest clearly establishes that that Court did not purport to construe the prior mandate of this Court.

Accordingly, the decision below presents no conflict with this Court's decision in *Taylor* v. *Standard Gas & Electric Co.*

2. Nor does the decision below present a conflict with the decision which the Court of Appeals for the Tenth Circuit rendered in the *Deep Rock* case after remand from this Court in *Taylor*.

It does not establish a conflict among Circuits to show that two Courts of Appeals affirmed District Court decisions which, in applying the equitable remedy of subordination to different sets of facts, arrived at results which do not fully coincide.

In *Deep Rock* the bankruptcy court subordinated the unsecured open account claims of Standard to Deep Rock's publicly held preferred stock and accumulated dividends and its publicly held unsecured notes and post-bankruptcy interest. The bankruptcy court below subordinated Respondent's claims against Inland to the principal of, but not post-bankruptcy interest on, the unsecured "quasi-creditor" claims of the holders of Kentucky Fuel Bonds and Debentures. Upon the respective appeals, the Tenth Circuit and the Sixth Circuit affirmed the District Courts.

Subordination of certain claims against a debtor to other claims over which they would normally have priority is an exercise by a court of bankruptcy of its equitable powers. The bankruptcy court applies those powers to the particular facts presented by a particular case, and such exercises of equitable power hardly create rules of law to bind subsequent bankruptcy courts in their application of those same powers to the different facts presented by a different case.

In any event, the decision of the Tenth Circuit in *Deep Rock* did not purport to apply any special rule of law made applicable to post-bankruptcy interest by reason of the equitable subordination of Standard's claims. In its opinion, the Tenth Circuit stated that it was affirming the District Court on the basis of its conception (clearly erroneous) of a general principle of law:

> "Where in the administration of the affairs of an insolvent corporation there are claims of different rank, the holders of prior claims are entitled to interest to the time of payment, even though the payment thereof may deprive the holders of subsequent claims of any participation in the funds of the bankrupt." (113 F. 2d at 269)

The decisions relied on by the Tenth Circuit in support of this statement do not support its conception of the general rule of law and two of these decisions were clearly overruled by this Court's decision in the *Saper* case. The Sixth Circuit in its opinion below pointed out the misconception of the general rule of law embodied in the *Deep Rock* decision:

> "In re Deep Rock Oil Corp., 10 Cir., 113 F. 2d 266, certiorari denied Standard Gas & Electric Co. v. Taylor, 311 U. S. 688, lends some support to appellants' contention. However, the ruling is based largely upon three cases, one of which was American Iron & Steel Mfg. Co. v. Seaboard Air Line Ry.,

> supra, 233 U. S. 261, which involved secured claims rather than unsecured claims, and two cases involving interest on tax claims which were decided contrary to and prior to the ruling in City of New York v. Saper, supra. These cases furnish no real support for the ruling." (Vanston App. 23a)*

The decision of the Sixth Circuit does not establish a conflict with a decision of this Court or a conflict among the circuits—with respect to the law as to post-bankruptcy interest, the law as to the equitable powers of a bankruptcy court or the law as to absolute priority.

III. THE COURT OF APPEALS DID NOT ABUSE ITS DISCRETION IN FAILING TO REVERSE THE ORDER OF THE DISTRICT COURT.

The Court of Appeals and the District Court (a) understood and correctly stated the rule of law concerning the payment of post-bankruptcy interest and (b) understood the breadth and completeness of the equitable powers of a bankruptcy court as stated by this Court in *Sampsell* v. *Imperial Paper & Color Corp.*** and *Pepper* v. *Litton.**** Thus, the decision below raises an issue only as to the propriety of the Court of Appeals' refusal further to exercise its equitable powers in response to Petitioners' request that the rule of law against post-bankruptcy interest not be applied in this case.

The basis of the Petitions is that the result reached by the District Court and affirmed by the Court of Appeals

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*The two tax cases referred to were *Board of Comm'rs* v. *Bercaw*, 74 F. 2d 800 (10th Cir. 1934) and *McFarland* v. *Hurley*, 280 Fed. 353 (5th Cir. 1923). The only two other cases relied on by the Tenth Circuit were *Central Trust Co.* v. *Condon*, 67 Fed. 84 (6th Cir. 1895), which dealt with secured claims (and, as in the *American Iron* case, with a corporation which actually proved solvent) and *Spring Coal Co.* v. *Veatch*, 239 Fed. 48 (4th Cir. 1916), which also dealt with secured claims.

**313 U. S. 215 (1941).

***308 U. S. 295 (1939).

necessarily is an inequitable one. Assuming that relative equities are decisive, this patently begs the question—did the Courts below properly *exercise* their equitable powers in refusing to reject Respondent's claims and classifying them as subordinate to principal but not post-bankruptcy interest on unsecured claims? The answer to this question necessarily involves factual considerations with which the District Court and the Court of Appeals are intimately familiar.

No one can purport to catalogue the equitable considerations which may have been weighed by the Courts below. Their knowledge of the equities was derived from many, many years of experience with these proceedings. District Judge Ford presided over the long trial in 1942 (see 1945 Rec. v. I-8) and at its conclusion made the detailed findings of fact which resulted in the initial subordination of Respondent's claims, and he has presided over all subsequent proceedings, those dealing with the day to day administration of the estates by the Trustee, and those dealing with the many successive plans for reorganization. The Court of Appeals on repeated occasions, upon successive appeals, studied and acted upon the pleas of one party and another for special equitable treatment.

Among the equitable considerations which the courts may properly have taken into account is the fact, so often raised in the proceedings before the District Court (and of which the Court of Appeals shows that it was well aware), that the real parties in interest to the Petitions are almost entirely "seasoned Wall Street speculators" who, upon receipt of the principal amounts of their claims alone, will reap very substantial gains.

For example, receipt of principal alone will yield Petitioner Kern on that part of his holdings of Kentucky Fuel Bonds which he purchased in the nine years 1944-1952, $31,798 for an investment of $83,676. For his Bonds purchased during 1953 and 1954, principal alone would

give him $320,866 for an investment of $290,568. Petitioner Kern's 1944 purchases were made at $6.30 per $100 principal amount. If he were allowed post-bankruptcy interest on them it would be at $6.50 per $100 of principal, an amount greater in each year that the proceedings continue than the entire amount he paid (certainly furnishing him no incentive to rapid termination of the proceedings). Another large holder of Kentucky Fuel Bonds has a cost basis of $37,000 for $440,000 principal amount thereof which, if post-bankruptcy interest were allowed, would accrue annual interest at the rate of $28,000.*

The specific cost figures in the record account for 54% of the Bonds and Debentures held by others than Respondent. Counsel for various parties below (including counsel for Petitioner Kern) have stated their belief that the overwhelmingly greater portion of all these securities are held by speculators, *e.g.*:

> "I also don't want to go unchallenged the hue and cry about ninety year-old ladies who are suffering because of the failure to get distribution. I have in my briefcase a letter from Mr. Harbison [American Fuel Trustee] dated back in September of 1954 in which he indicates to me that . . . there are outstanding in the hands of the original holders of American Fuel notes approximately 2% of the entire issue . . . which tends to support what I have said here so often, that all of these securities are in the hands generally of, not original investors, but of Wall Street — well inured, seasoned speculators." (T. July 14, 1955, p. 75*).

In response to an inquiry by the District Court as to whether any Kentucky Fuel Bonds or Debentures remained in the

*See Appendix of Ben Williamson, Jr., Trustee of Inland and Kentucky Fuel and Clinton M. Harbison, Trustee of American Fuel, pp. 105, 109 (filed in the Court of Appeals and certified to this Court in these causes).

hands of original purchasers thereof, counsel for Petitioner Kern has stated:

> "We did run on one, Your Honor. We found one gentleman in Pennsylvania. I don't know his name. I heard that he owned $1,200.00 of Bonds and, of course, Mr. Williamson's proofs of ownership would show. I think there probably are some, but very few and relatively small amounts." (T. March 8, 1956, p. 126.)

That these reorganization proceedings had provided a field day for speculators was first recognized by the Court of Appeals in 1953 (see 208 F. 2d 13, 14-15) and the history of petitioner Kern's role in these proceedings was again adverted to in its introductory statement to its opinion below:

> ". . . Kern was not an original investor in the Kentucky bonds and debentures but began buying Kentucky securities on May 5, 1941 and after the large claims of the Columbia Gas & Electric Corporation were because of its inequitable conduct subordinated to the claims of all other creditors of the Debtors and, because of the successful operations of the Trustee, continued to purchase Kentucky securities throughout the years until he had acquired $303,300.00 face value of first mortgage bonds and a substantial number of Kentucky debentures through 1952, 1953 and 1954 until he owns 34% of the outstanding issue of bonds and some debentures. If the submitted Plan of reorganization is confirmed, it is clear that Kern will reap a very substantial profit upon his purchases, even if the tax claim of the Government is sustained, and a much greater profit if the tax claim is held invalid." (Vanston App. 8a-9a.)

CONCLUSION

The Petitions for Writs of Certiorari (Nos. 325, 336 and 342) to the decision of the Court of Appeals of the Sixth Circuit should be denied.

Respectfully submitted,

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